NO. 22401

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MANUEL LUNA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF FACTS

Appellant, Manuel H. Luna, was indicted on March 16, 1960, on nine counts alleging violations of Title 21, United States Code, Section 174. Counts One, Three, Five and Seven alleged that Luna sold heroin to an agent of the Federal Bureau of Narcotics. Counts Two, Four, Six and Eight alleged that Luna received, concealed and transported heroin. Count Nine alleged a conspiracy with other co-defendants to sell approximately 64 grams of heroin. After a jury trial, the Honorable Judge Tolin presiding, Luna was found guilty on all counts and he received eight concurrent twenty-

year sentences and, on one possession count, he received a five-year consecutive sentence.

The events which led to the indictment and conviction were as follows:

Ernest Ochoa was an undercover informant for the Federal Bureau of Narcotics. Ochoa had known Luna for over ten years, although perhaps not well enough to know his true name beyond his nick-name [R. T. 764]. 1/ In late November, 1959, in the presence of a small group (including Luna and his estranged wife) who were discussing narcotics, Ochoa mentioned that he knew of a good buyer of heroin for whoever had a large quantity to sell [R. T. 708]. Luna then discussed heroin with Ochoa and later Luna said he had a source of potential supply [R. T. 700, 709]. Although Luna later testified that at his first meeting he indicated strong disinclination to sell, he testified that he informed Ochoa he knew of no source to acquire heroin "at the present time, but if I knew, that I would let him know . . . ." Luna testified that this encouraging language was only intended as a means to end the conversation [R. T. 639-43].

Within a few days, Ochoa introduced Luna to Mr. Maria, secretly an agent of the Federal Bureau of Narcotics. Ochoa had told Maria that he knew Luna was involved in the narcotics traffic [R. T. 200]. At this meeting, Luna was told that Maria wanted to buy heroin, and was shown some money [R. T. 650]. Maria

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1/ "R. T." refers to Reporter's Transcript.

testified that at this meeting Luna readily expressed willingness to sell heroin and discussed the possibilities of arranging a sale to Maria [R. T. 199]. Luna himself admitted in his testimony that at this time he expressed willingness to sell, yet limited to a promise that he would tell Ochoa when he could supply heroin in the event "that somebody might approach us" [R. T. 639-41]. In fact, Luna went far beyond this promise. At this initial meeting, he specifically told Maria he would supply him with an ounce of heroin at a price close to $500 per ounce, arguing the price was not too high because he had good quality heroin [R. T. 199, 758].

During the ensuing weeks, Ochoa, upon chance meetings at a cafe he and Luna commonly partronized, spoke to Luna about the proposed sale [R. T. 646]. Being desirous of completing an actual heroin transfer, Ochoa, during this period, unsuccessfully attempted to contact Luna by telephoning Luna's estranged wife and leaving messages that the buyer, Maria, was ready and willing to complete the sale. Luna's wife testified to five such calls, asserting (although Ochoa would not confirm this) that Ochoa, besides attempting to contact her husband in order to complete the sale, asked her whether she knew of a supply of narcotics [R. T. 619-29]. Ochoa, by virtue of the above communications, made clear and reiterated that he was an available conduit for sale of a large amount of heroin. Yet neither Mr. Luna nor his wife testified to any pressure exerted, or any pleas or importunings by the Government agents.

Luna, during early January, telephoned Ochoa and arranged

to meet him. At this meeting, Ochoa telephoned Maria, and Luna negotiated with him on the telephone and arranged a further meeting at a cafe [R. T. 224, 711, 719]. At this meeting, Ochoa not being present, Agent Maria asked Luna if he were ready to deal without delay. Luna replied that he was ready to sell [R T. 107]. After some haggling over price, the sale was agreed upon and completed [R. T. 107-111, 224]. Additional sales were consummated between Luna and Agent Maria, again without any participation of Ochoa, on January 27, February 2 and February 23, 1960. At this last sale, Luna and co-defendants Collins, Pulido and Vasquez were arrested. The total amount sold to Maria by Luna was approximately 186. 9 grams at a total price of $2, 100. 00.

Collins' testimony revealed that Luna had approached him and requested him to acquire heroin from Tijuana [R. T. 483]; that he had entered into an arrangement with Luna to split the profits from the sales [R. T. 533-34]; that Luna acquired milk sugar and "cut" the heroin acquired from Pulido, Vasquez and others [R. T. 484, 491-93]; and that Luna took the heroin and sold it at a profit.

At trial, Luna admitted all sales to Maria and relied on the defense of entrapment. At this early point in the trial, since entrapment was raised, the trial court gave a preliminary instruction to the jury stating that:

> "The policy of the law is that it is not right for law-enforcement people to go about inducing people to commit crimes. Therefore, they cannot do it. And if they do, it is a defense. If an officer

suggests to me that I commit a crime, he cannot talk me into doing it and then arrest me validly and prosecute me for something which arose in his mind rather than mine.

"However, if a person is known or believed on reasonable grounds to be likely to be committing a course of criminal activity, then it is perfectly proper for officers to provide opportunities in order to catch the criminal at his more or less recurring type of offense.

"The whole gist of it is that if the commission of a crime was born first in the mind of the defendant, so that he would have committed it whenever the opportunity afforded, then you may undertake to afford him the opportunity. But if the defendant was a person who would not have committed the crime except for the enticement or suggestion of the law-enforcement person, then the events originated in the mind of the law-enforcement agency, and the defendant would have to be acquitted." [R. T. 766-67].

Then ensued the following colloquy between the judge and defense counsel:

"THE COURT: Does that explain it sufficiently, counsel?

"MRS. KATZ: Very good job, your Honor."

[R. T. 767].

To refute the defense of entrapment by showing pre-disposition of Luna to sell heroin, the government introduced evidence of Luna's reputation in the community. Agent Maria testified that he became aware of Luna's reputation through Ochoa and other members of the community, and testified that Luna had been arrested on a few occasions, dating back twelve years, for narcotics violations [R. T. 763-73]. Ochoa testified that Luna had acquired a reputation in the community for involvement in the narcotics trade [R. T. 784-87].

In addition to the preliminary instructions given during the trial, the judge instructed the jury at length on the essential elements of the offenses charged, on the defense of entrapment and on the government's burden of proving all elements of its case beyond a reasonable doubt [R. T. 826-34-A, 838-39, 842-43]. Defense counsel made no objection to these instructions [R. T. 844].

Although no notice of appeal was filed, leave to appeal was granted Luna pursuant to a motion under Title 28, United States Code, Section 2255.

II

QUESTIONS PRESENTED

Defendant's brief raises the following questions:

1. Considering the evidence in the light most favorable to the Government, was the trial court required to find that, as a matter of law, entrapment was established?
2. Was pre-disposition effectively established by properly admissible evidence of prior arrests and/or reputation of the defendant?
3. Is entrapment, once propounded, a question for the jury; or must the court decide the issues of justification and pre-disposition?
4. Did the instructions mislead the jury into believing the Government did not have the burden of disproving entrapment, so as to constitute plain error?
5. Did the wording of the entrapment instructions mislead the jury into believing that an informant could not be the entrapping force, or that prior criminality precluded entrapment?
6. Were the instructions on the presumptions arising from Title 21, United States Code, Section 174 adequate, or did they connote that possession alone was sufficient evidence to convict for sale, so as to constitute plain error?

III

ARGUMENT

A. CONSTRUING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THE EVIDENCE DID NOT SHOW ENTRAPMENT AS A MATTER OF LAW OR FACT.

Due to traditional Anglo-Saxon notions of fair play and decency, our jurisprudence strives to eliminate the sinister figure of the agent provocateur from police detection. It has never been seriously disputed, however, that because certain types of offenses are invariably committed privately with a willing non-complaining "victim", thus rendering detection by normal methods improbable, agents investigating this type of activity are required to adopt some kind of subterfuge presenting the criminal with a tempting opportunity to ply his trade. Especially in the illegal and increasingly troublesome narcotics trade, police deception constitutes the "only successful manner to combat the evil". Trice v. United States, 211 F.2d 513, 516 (9th Cir. 1954). Thus it is clear that the use of undercover agents to provide an opportunity for the commission of a crime, without anything else, provides no semblance whatsoever of entrapment, Lucero v. United States, 311 F.2d 457, 458 (9th Cir. 1962), even if the first overtures came from such agent. Matysek v. United States, 321 F.2d 246, 247 (9th Cir. 1963); Whiting v. United States, 321 F.2d 72 (1st Cir. 1963).

It is true, of course, that at the other extreme, where "undisputed" testimony makes it "patently clear" that an otherwise innocent person was induced to commit the act complained of, the court may find entrapment as a matter of law. Sherman v. United States, 356 U.S. 369 (1958). It is at this extreme that Luna necessarily contends this case resides.

The facts brought out at trial show that while Ochoa may have purposefully discussed narcotics with defendant on several occasions, there is no evidence whatsoever of any argumentative persuasions, no appeals directed at a special weakness such as friendship, or physical need for narcotics, or sick or dying friends. On the contrary, Luna never expressed more than the natural hesitancy of the narcotics seller, always keeping his buyer "on the hook" by constant encouragements that he would provide the requested heroin. Ochoa and Maria never expressed any more enthusiasm than the natural great interest of the heroin buyer in acquiring an ample supply of a product which is not always easy to find. The evidence at no point raises any significant similarity with the factual situations which the courts have found to have fulfilled the requisites of entrapment as a matter of law.

Although Luna relies on the leading Sherman case, supra, the facts and decision of that case clearly do not support the contention that entrapment as a matter of law exists here. In Sherman, contrary to the facts of this case, there was no evidence of defendant's reputation as a narcotics seller, and no evidence that he made a profit on the sales he was convicted for. Sherman was an addict

whom the informant met at a doctor's office where Sherman was undergoing a cure for his addiction. After befriending him, and after repeated meetings and constant entreaties, emphasizing the informant's physical pain from lack of narcotics, Sherman was induced to find heroin, share it with the informant and thus return to the habit. Emphasizing these shocking facts, the Supreme Court held that entrapment as a matter of law existed.

In this Circuit, the leading case of Trice v. United States, 211 F. 2d 513 (9th Cir. 1954), cert. denied 348 U.S. 900 (1954), is informative. There, defendant's close friend, who was an addict suffering from tuberculosis, was dying in the hospital. This friend had begged defendant for narcotics. A narcotics agent approached defendant as a friend of Trice's dying friend. The dying friend turned out to be an informant who supplied the Agent with a note for Trice requesting narcotics. After telling Trice of the great pain suffered by his friend, the agent convinced Trice to acquire and sell some heroin, which Trice easily did. Despite the probabilities that sympathy was utilized as emotional pressure, and because of sufficient evidence of Trice's pre-disposition to sell narcotics, entrapment was held not to exist as a matter of law.

Similarly, where a Food and Drug Inspector, dressed as a woodsman, pleaded he was having great difficulty sleeping, thus inducing defendant to dispense narcotic pills without a prescription, entrapment as a matter of law was not established. Archambault v. United States, 224 F. 2d 925 (10th Cir. 1955). And where an agent pretended to be a drug addict suffering from ailments for

which his former doctor had prescribed and sold narcotics, the physician who then sold him narcotics was held clearly not to have been entrapped as a matter of law. Newman v. United States, 299 F. 2d 128 (4th Cir. 1924). See also United States v. Brandenburg, 162 F. 2d 980 (3rd Cir. 1947) [Agent faked symptoms of tuberculosis].

In the present case, the agents used subterfuge, yet appealed to no emotional or physical characteristic of defendant. Luna always expressed readiness to sell and went over the details of sale at the first meeting with Maria only a few days after the subject of heroin was first mentioned by Ochoa. That defendant was no innocent stranger initiated into nefarious dealings is evidenced by the fact of his prior arrests; see Carson v. United States, 310 F. 2d 558 (9th Cir. 1962; Carlton v. United States 198 F. 2d 795 (9th Cir. 1952), his preparation of and the quality of the drugs sold, see United States v. Toy, 273 F. 2d 625, 626 (2d Cir. 1960), his willingness to make subsequent sales, see Gonzales v. United States, 251 F. 2d 298, 299 (9th Cir. 1958); Trice v. United States, supra, and his reputation in the community as a narcotics seller. Clearly the Government did not initiate Luna's criminal state of mind, it merely activated the criminal transaction. See Saganski v. United States, 358 F. 2d 195, 202 (1st Cir. 1966). That six weeks elapsed between the first time the sale of heroin was discussed and the time when the first actual transaction was completed should not militate for a finding of entrapment as a matter of law. See United States

v. Sosa, 379 F. 2d 525 (7th Cir. 1967). Hardly any time had elapsed when Luna expressed more than sufficient interest, amounting virtually to a preliminary agreement, to put the buyer on further inquiry. This Court has found that a two and one-half months time lapse, which defendant contended was due to his resistance to alleged Government persuasions, could well have resulted from the time needed to find and exploit a source of supply, and thus presented a question for the jury. Young v. United States, 286 F. 2d 13, 15 (9th Cir. 1960), cert. denied 366 U. S. 970 (1961).

B. EVIDENCE OF REPUTATION AND PRIOR ARRESTS WAS PROPERLY ADMITTED AND FORMED A SUFFICIENT BASIS FOR GOVERNMENT ACTION IN PROVIDING OPPORTUNITY FOR CRIME.

Once sufficient evidence is presented to create a jury question of entrapment, the Government may conduct a searching inquiry into defendant's past in order to show predisposition for this type of illegal behavior and the attendant reasonableness of the Government's activities. Sherman v. United States, supra, at 372; Sorrells v. United States, 287 U.S. 435 (1932). To that end, the Government in this case introduced evidence of twelve-year old arrests for narcotics violations and evidence of Luna's past and current reputation in the community for involvement in narcotics trade.

Evidence of predisposition and justification for Government activities has never been regarded as requiring the conclusiveness of a certainty that defendant is in fact an established narcotics dealer. The Government does not have to show even "probable cause" for belief that defendant is so engaged. See Trice v. United States, supra, at 519.

As stated by the First Circuit:

> "Solicitation to commit a crime does not of itself involve constitutional rights, and is not comparable to the arrest of a person or to the invasion of premises. . .
>
> "We hold that it is not per se offensive

conduct for the Government to initiate inducement without a showing of probable cause."

Whiting v. United States, 321 F. 2d 72, 76-77 (1st Cir. 1963) cert. denied 375 U.S. 884 (1963).

The evidence of prior acts need not even show that defendant was ever arrested, and such evidence may constitute what otherwise would be inadmissible hearsay. Trice, supra, see also, Washington v. United States, 275 F. 2d 687, 690 (5th Cir. 1960); Carlton v. United States, supra, at 798-99. If hearsay evidence of prior sales not leading to arrest is admissible, a fortiori, evidence of prior arrests for related offenses is admissible.

Luna complains that the arrests took place some twelve years prior to the sale. This Court has found identical or longer periods of time not to be too remote. Trice, supra; Carlton, supra.

Luna also complains that the narcotics agent (Maria) and informant (Ochoa) did not have a sufficiently authoritative foundation upon which to base their testimony of reputation in the community. Maria's knowledge stemmed from the record of prior arrests, supra, and conversations with habitués of the cafe where Luna constantly spent his spare time. Ochoa was a member of the same community and had known Luna and his associates for more than a decade. The secretive nature of the narcotics trade and the

exigencies of efficient use of time for police detection may have precluded any great concreteness to the narcotics agent's information. Yet cross-examination was available to be utilized to attempt to persuade the jury not to attach great weight to Maria's testimony. Ochoa's testimony as to reputation, built on a very solid foundation, was likewise subject to cross-examination in order to test its weight. See United States v. Cooper, 321 F. 2d 456 (6th Cir. 1963). See also Proffit v. United States, 316 F. 2d 705 (9th Cir. 1963). And, in an unrelated context where the use of reputation evidence has traditionally been subject to great judicial wariness, it was said:

> "Both propriety and abuse of hearsay reputation testimony, on both sides, depends on numerous and subtle considerations difficult to detect or appraise from a cold record, and rarely and only on a clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject."
>
> Michelson v. United States, 335 U.S. 469, 480 (1948).

Luna concludes that the Government's actions in providing him an opportunity for crime cannot find justification, as a matter of law, by virtue of his reputation for involvement in the narcotics trade. The Government notes that, besides Luna's reputation, the narcotics agents relied on a number of prior narcotics arrests,

albeit aged. Even if this were not so, to require the Government to act only upon incontrovertible evidence of specific proven criminality "would, in effect, give the narcotics peddler 'one free shot' before he could be convicted for his crimes." Young v. United States, supra, at 15. Despite Luna's contrary affirmations, no requirement of "good cause . . . reasonable belief. . . [action restricted to the] close independent supervision [of] . . . a neutral and detached magistrate" [Appellant's Brief at 31-32], have been imposed in entrapment cases. Nor should they; rather than situations where Government action directly deprives a person of his liberty (e.g. warrants) or situations where the availability of alternative methods suffice to outbalance the threat of infringements on privacy, (e.g., restricting police methods of search and interrogation), police stratagem of this type does not infringe upon rights, and the undercover "victimless" narcotics trade often can only be detected upon relatively scant evidence of wrongdoing. This does not mean that law enforcement officers should be allowed free rein in offering inducement. Rather, practicality and the low probability of invasion of rights necessitates that narcotics agents investigate all trustworthy scents of illicit activities.

C. NEITHER EXISTING CASE LAW NOR THE POLICIES UNDERLYING THE FUNCTION OF THE JURY SUPPORT THE CONTENTION THAT THE JUDGE SHOULD DETERMINE WHETHER THE GOVERNMENT HAD CAUSE TO PROVIDE OPPORTUNITY TO THE ACCUSED TO COMMIT THE CRIME CHARGED IN THE INDICTMENT.

Once a defendant raises the entrapment defense and alleges that government agents induced him to violate the law, the government may cast light on their use of detection by encouragement by showing an "existing course of similar criminal conduct" by defendant or his "already formed design to commit the crime or similar crimes." See United States v. Becker, 62 F. 2d 1007 (2d Cir. 1933) (L. Hand, J.). The government thereby justifies their actions as prompted by defendant's predisposition to commit a particular type of crime. In proving predisposition, great latitude is accorded the government in bringing to light relevant features of defendant's past conduct. If the result of such inquiry shows scant evidence of previous wrongdoing, not only is predisposition made unlikely, but the defendant gains in psychological effect by evoking the ugly spectre of the agent provocateur to be contrasted with the lack of shortcomings on defendant's part. Yet, as is often the case, if inquiry into defendant's predisposition uncovers a great deal of past wrongdoing and discloses his reputation as, e.g., a narcotics seller, a risk is created that the jury may allow this evidence to weigh in its determination of

guilt of the offense charged. Because of this possibility, Luna would have this court rule that the question of whether he was predisposed to commit the offense and the government justified in providing him with opportunities to do so are inquiries which are psychologically too demanding of a jury. Thus, Luna avers, they are to be dissected from the case and excoriated from the sight of the jury, fit only for the cold impartiality of judges.

The Supreme Court of the United States has ruled directly contrary to Luna's contention. Sorrells v. United States, 287 U.S. 435, 445-49 (1932). Faced with the affirmation that the entrapment issue must be decided separately before the judge, the Sorrells court reasoned that such a process, rather than leave entrapment as a defense, would relegate it to the status of a judicial dispensation from prosecution, thereby offending the Congressional intent manifested in the statute.

Sorrells' vintage should not connote probability that the court might well reach a contrary result today. In the landmark Sherman decision, although severance of entrapment issues was not directly presented, the Court commented on the subject:

> "Not only was this rejected by the Court in Sorrells but where the issue has been presented to them, the Courts of Appeals have since Sorrells unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function

of determining the guilt or innocence of the accused.

"To dispose of this case on the ground suggested would entail both overruling a leading decision of this court and brushing aside the possibility that we would be creating more problems than we would supposedly be solving."

Sherman v. United States, 356 U.S. 369, 377-78 (1958). See also Osborn v. United States, 385 U.S. 323. 322 N. 11 (1966).

As noted in Sherman, the Courts of Appeals have been virtually unanimous in deciding against shielding entrapment issues from the view of juries. See e.g., Erwing v. United States, 394 F. 2d 829, 830 (9th Cir. 1968); United States v. White, 390 F. 2d 405, 406 (6th Cir. 1968); United States v. Dehar, 388 F. 2d 430, 433-34 (2d Cir. 1968); United States v. Johnson, 371 F. 2d 800, 803 (3rd Cir. 1967); Carson v. United States, 310 F. 2d 558, 559, 560-61 (9th Cir. 1962); Walker v. United States, 298 F. 2d 217, 225 (9th Cir. 1962); Young v. United States, 286 F. 2d 13, 15 (9th Cir. 1960); Demos v. United States, 205 F. 2d 596, 599 (5th Cir. 1953). It is submitted that Judge Friendly, speaking for the Second Circuit aptly portrayed the state of the law on this point:

"So long as Sorrells stands, our problem is not whether entrapment should ever be submitted

to the jury, but when the evidence calls for doing so . . . [i. e. when entrapment is not shown as a matter of law]. . . "

United States v. Riley, 363 F. 2d 955, 957 (2d Cir. 1966).

Recently, this Court stated that,

"Appellant . . . contend[s] . . . that the nature of the entrapment defense is such that it can never be adequately and fairly dealt with by a jury. Cf., Jackson v. Denno . . . In view of Sherman . . . and Sorrells . . . such a change in the law must be left to others."

Erwing v. United States, 394 F. 2d 829, 830 (9th Cir. 1968). See also Carlton v United States, supra, at 797-98.

Yet Luna, despite the Erwing decision, looks to Jackson v. Denno, 378 U. S. 368 (1964), as support for his affirmations. In that case it was found inherently rife with potential prejudice for the same jury to rule on voluntariness (and thus, admissibility) of a confession and on the guilt or innocence of the defendant. In balancing the sanctity of the jury's domain with the vast potentialties for prejudice, it was ruled that the judge should decide on voluntariness out of the presence of the jury. In entrapment cases no such balance is struck. Distinct, often conflicting factual issues

are here presented for resolution. To sever the questions of predisposition and justification from inducement is to obscure their essential interdependence. To allow the defense to show the government agents' actions in vacuo, without allowing the jury to take into account the relevant factors of predisposition which justify the government's acts, is to create an unreal factual setting for the jury to rule on. This should be seen in light of the fact that the government must prove a negative--non-entrapment--beyond a reasonable doubt. The practice struck down in Jackson v. Denno required the jury to know that defendant has admitted the crime charged and then to strike this from their mind and consider his present refusal to admit the crime. Severing the voluntariness issue from the jury's earshot still allowed the jury to pass on all the relevant factual issues of the case. No such prejudicial enormity nor potentialities for logical surgery exist in entrapment cases.

The law forecloses the whole line of inquiry which Luna contends prejudices his case unless defendant thinks the net advantage from opening it up would be with him. As the view of the prevailing law has it:

> "[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and disposition as bearing upon that issue. If in consequence he suffers a dis-advantage, he has brought it upon himself by

reason of the nature of the defense."

Sorrells v. United States, supra, 287 U.S. at 451-52. Cf. Michelson v. United States, 335 U.S. 469, 485 (1948).

And, as expressed by the First Circuit:

"If an accused asserts that he is a lamb who has been led astray he must be prepared to face evidence that he is a wolf on the prowl."

Gorin v. United States, 313 F. 2d 641, 653 (1st Cir. 1963).

By relying on Jackson v. Denno, defendant likens the situation where the Government attempts, as part of its case in chief, to introduce questionable and highly prejudicial statements, to the situation where defendant has chosen to defend on grounds of his own innate non-criminality and the Government responds, as it must, by proving the contrary. An easy and fair dissection of evidence admissibility is thus erroneously analogized to the cumbersome and irrational bifurcation of essential issues prompted by the defense.

Defendant's underlying view on the legal mechanics of entrapment intimates that rather than a defense, the entrapment doctrine provides for judicial dispensation, precluding application of penal statutes. Sorrells is to the contrary and the

Supreme Court has expressed disinclination to overturn that decision. Or, defendant is averring that entrapment is a defense, but is "too hot" for the jury to handle. Such lack of faith in juries belies the historical raison d'etre of that institution. It goes beyond Jackson v. Denno to a contention that juries are simply untrustworthy except where chances of prejudice are virtually non-existent. Its logical conclusion is that in all criminal prosecutions where defendants put their character in issue or simply take the stand and are to be impeached by prior convictions, the jury cannot hear the relevant impeachment due to potential prejudice. Such is not the law.

D. THE COURT'S INSTRUCTIONS TO THE JURY VIEWED IN THEIR TOTALITY DID NOT CONSTITUTE PLAIN ERROR.

1. The Jury Was Not Misled Into Believing Any Affirmative Finding Was Requisite To Acquittal.

Luna's counsel did not in any way object to the entrapment instruction [R. T. 844]. Thus, he is precluded from relitigating the issue on appeal unless "plain error" is shown. Federal Rules of Criminal Procedure, 52(b).

After instructing that entrapment would not lie if the jury found predisposition of the defendant and that the Government merely offered opportunity, the jury was instructed that it must acquit defendant if it "should find" what was then explained (and had been previously explained) to be entrapment [R. T. 839]. Although this Court has ruled to the contrary, Nordeste v. United States, 383 F. 2d 335, 339-40 (9th Cir. 1968), Luna avers that such phrasing led to plain error because it allegedly connoted that the jury had to make an affirmative finding of entrapment or convict the defendant. The above excerpt from the instructions, however, must be seen in the context of the instructions as a whole. Notaro v. United States, 363 F. 2d 169, 176 (9th Cir. 1966). Preceding the above-quoted words, the instruction read:

> "The defendants are entitled to the presumption of innocence. This presumption

attends them throughout the trial, and the burden of overcoming this presumption rests upon the Government which must establish the defendant's guilt by evidence beyond a reasonable doubt . . . "

[Then follows a lengthy definition of reasonable doubt.]

"You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you." [R. T. 834-A], (emphasis added).

After the portion of the instructions here complained of was given, Judge Tolin warned the jury not be swayed by any hysteria over narcotics problems and reminded the jury of the serious consequences of conviction, concluding with the cautionary statement, "[T]herefore, you want to be very careful, giving them the benefit of any reasonable doubt and remember also if no reasonable doubt remains that the government is entitled to a verdict of guilty." [R. T. 843].

It is submitted that the above instructions forcefully brought home to the jury, before and after the entrapment instruction, that all elements of the government's case must be proven beyond a reasonable doubt. Since entrapment was effectively the only issue in Luna's case, and the jury knew that the reasonable doubt standard applies to all issues, the jury could hardly avoid the conclusion that the government had the burden to prove non-entrapment beyond a reasonable doubt. Nordeste v. United States, supra (identical instruction and contention; no plain error). Moreover, entrapment was fully explained to the jury during trial, provoking defense counsel's reaction, "Very good job, your honor." [R.T. 767].

This Court and the Supreme Court of the United States have consistently asserted that plain error will not be found where defendant did not object and instructions similar to the one attacked by Luna, taken as a whole, did not undermine substantial rights. Lopez v. United States, 373 U.S. 427, 436 (1963); Nordeste v. United States, supra; Smith v. United States, 390 F.2d 401, 402-03 (9th Cir. 1968); Young v. United States, 286 F.2d 13, 16 (9th Cir. 1960). See also Cohen v. United States, 366 F.2d 363, 368 (9th Cir. 1966), cert. denied, 384 U.S. 1035 (1967). And similar allegations against virtually identical instructions have also been refuted in the various circuits. Cross v. United States, 347 F.2d 327 (8th Cir. 1965); Martinez v. United States, 300 F.2d 9 (10th Cir. 1962); Chapman v. United States, 271 F.2d 593 (5th Cir. 1959). See also Harrington v.

United States, 391 F. 2d 605 (5th Cir. 1968); Demos v. United States, 205 F. 2d 596 (5th Cir. 1953) cert. denied, 346 U. S. 873 (1953).

2. No Plain Error Resulted From The Wording Used In The Instruction.

Since the Court at one point used the phrase "Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of entrapment", Luna contends plain error arose in that the jury would think that prior lawbreakers, having once had the intent to violate the law, could not defend on grounds of entrapment. The lengthy entrapment instructions, repeated and re-explained by the judge, are thus asserted to be faulty because of the interjection of this phrase. Surely if the jury thought entrapment was not an available defense they must have thought it odd that the judge continuously explained the defense to them, especially in light of the fact that entrapment was obviously the primary issue in Luna's prosecution. In reality, the entrapment issue was presented as a question of whether the commission of this crime "originated in the mind of the law-enforcement agency" and was not "born in the mind of the defendant" rather than an instruction that previous criminality precluded entrapment [R. T. 767]. Again, the government notes defense counsel's agreement with the instructions and notes

that the previously cited case law of "plain error" in no way comports with defendant's contentions.

The above considerations also apply to Luna's contention that the instruction's reference to entrapment by "government agents" connoted that the informant could not be the entrapping force. Despite this contention, it is well to note that the Court did in fact refer, in its instructions, to entrapment issues raised by an offer "either directly or through an informer or other decoy to purchase narcotics from an unsuspecting person." [R. T. 839].

Moreover, the informant while on the stand, known by the jury to be an informant, was presented as a government "agent" [R. T. 698]. And, in closing argument, defense counsel stated that "Mr. Ochoa [the informant] was a government agent or at least Mr. Maria says so;" [R. T. 805], and stated the defense that "the idea [to sell] was put in [Luna's] mind by Mr. Ochoa and further by Mr. Maria [the narcotics agent]." [R. T. 805]. Defense counsel made quite clear that it was the informant's inducement which was the focal point of the alleged entrapment [R. T. 805-06].

This court has ruled adversely to defendant on an identical claim that failure to directly specify that informants are government agents capable of inducement constitutes plain error. Nordeste v. United States, 393 F. 2d 335, 338-39 (9th Cir. 1968).

3. No Error Resulted From the Judge's Instructions On The Presumptions Stemming From Possession.

Luna took the stand and admitted selling heroin to the agent. The defense in no way even hinted denial of these sales. Consequently, not the faintest objection was heard when the trial judge instructed the jury that possession of heroin gives rise to an inference that it was imported contrary to law with the possessor's knowledge, and thus he must justify his possession or risk conviction [R.T. 832-33]. Luna contends that plain error stems from the trial judge's failure to clearly and specifically convey to the jury that if Luna did not explain and justify possession, this would not by itself support a conviction for the sale of the drug, conceding its relevance to other counts.

The nine-count indictment contained four counts alleging the "sale" of heroin. The evidence at trial conclusively and uncontrovertedly showed specific sales in accordance with the indictment. In his instructions to the jury, preceding the instructions dealing with presumptions, Judge Tolin read each count of the indictment to the jury. Each count specified the gravamen of the illegal behavior, each sales count delineated all relevant acts constituting each specific sale which the jury must find to convict. When the presumption instruction was announced the jury must have understood that its relevance to the sales count was not such that a "sale", in its common meaning, need not be found. It is

hard to believe that there exists any rational probability that the jury would think that "sale" does not mean "sale", that a conviction for sale of narcotics could rest on possession alone.

The instruction as to presumptions must be viewed as a whole. Immediately following the statement that non-explanation of possession is sufficient for conviction, the Judge explained the limit to this concept:

> "Despite the fact that the indictment contains the allegations that the heroin involved had been imported into the United States contrary to law, and that the defendant knew such to be the fact, nevertheless, the statute makes it unnecessary for the Government to offer any evidence in support of the charge as to these elements if the Government shows that the defendant was in constructive or actual possession of the substance. Actual or constructive possession of the substance gives rise to an inference that it was imported contrary to law and to the further inference that the person in possession had knowledge of such unlawful importation. It is then incumbent upon the defendant to go forward with the evidence and show that he came into possession of the substance legally. In this connection, I charge you that if you find defendant had in his possession the forbidden substance, such possession, actual

or constructive, alone would be sufficient proof of the elements of importation and knowledge thereof, unless such possession is explained to your satisfaction.

"A defendant on trial may overcome inferences arising against him from actual or constructive possession by facts and circumstances and by satisfactory proof that in his case possession did not involve a violation of the statute, either because the substance was not imported contrary to law or because he had no knowledge of unlawful importation."

[R. T. 832-33] (emphasis added).

Of the nine counts upon which Luna was convicted, he received twenty-year concurrent sentences on all sales counts, a twenty year concurrent sentence on the conspiracy count and on all possession counts but one he received twenty-year sentences to run concurrently. On one possession count he received a five-year sentence to run consecutively. Where sufficient evidence exists to convict on any of several concurrent counts, reversal will not result from error on another count upon which a concurrent sentence was imposed. That such harmless error does not require reversal is a well-established rule in this circuit. Russell v. United States, 288 F. 2d 520, 521-22 (9th Cir. 1961). Thus even if conviction on the sales counts was in any way tainted, the "plain error" prerequisite has not been met.

IV

CONCLUSION

For the reasons stated in the argument, the judgment of the District Court should be affirmed.

Respectfully submitted,

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